IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 10TH AUGUST 2007 / 19TH SRAVANA 1929

CRL.A.No. 829 of 2000()

CC.63/1997 of I ADDL.SESSIONS COURT, ERNAKULAM

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APPELLANT:

BASHEER @ UMBU, AGED 30,
S/O. HUSSANKUTTY,
CHELLIYATTU PARAMBIL VEETTIL,
C.C.NO.7/907, KAPPALANDIMUKKU,
MATTANCHERRY.

BY ADV. SRI.T.D.ROBIN
SMT.MANJU ANTONY,STATE BRIEF

RESPONDENTS:

STATE OF KERALA REP. BY
C.I. OF POLICE, PALLURUTHY,
CRIME NO.27/1997 OF THOPPUMPADY POLICE STATION.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.829 OF 2000-D

Dated this the 10th day of August, 2007.

JUDGMENT

The sole accused in C.C.No.68/1997 on the file of the First Additional Sessions Judge, Ernakulam, is the appellant. He was charge sheeted by the Circle Inspector of Police for an offence punishable under Section 20(b)(i) of the N.D.P.S.Act, 1985. The prosecution case against the appellant was that the Sub Inspector of Police, Thoppumpady Police Station – PW4, on getting information that the appellant was engaged in selling ganja at the west of Thoppumpady Kazhuthumuttu junction near 66 K.V Substation at the road and on recording the same, he informed the matter by a letter to the Circle Inspector of Police, Palluruthy and went the place at about 3.15 p.m and it was seen that the appellant was standing on the road and on further questioning him, it was understood that he was in possession of ganja. Hence, PW2 - the Excise Circle Inspector was informed and he reached at the place of the incident and body of the appellant has been searched and it was fond that the appellant kept MO1 packet in his loin which contained 10 small packets. On further examination of the packets, it was

revealed that the packets contained 46.700 grams of ganja and in the presence of PW2 and other independent witnesses, the same was seized as per Ext.P1 seizure mahazar and the sample was also taken from the contraband article seized from the appellant. Further it was alleged that an amount of Rs.25/= was also seized from the appellant and after arresting the appellant a case was registered against him and after completion of the investigation, PW5 - the Circle Inspector filed the final charge against the appellant alleging he had committed an offence punishable under the provisions of the N.D.P.S Act.

2. To prove the case against the appellant, prosecution examined five witnesses and produced Exts.P1 to P7.. MOs 1 to 4 were also produced. It was also proved as per Ext.P5 chemical report that the sample analysed was ganja. After closing the prosecution evidence, the appellant was questioned under Section 313 of the Code. He denied the prosecution charge and has stated further that he is innocent. He was taken into custody by the police while he was taking food from a hotel. The appellant has further stated that the ganja which kept by him was for his own use and without the use of ganja, it is difficult for him to live. He has further stated

that he was under treatment also. To prove the case of the appellant, two witnesses Dws 1 and 2 were examined. Exhibit D1 was also produced to prove the case of the appellant. However, on considering the evidence adduced by the prosecution, the trial court found the appellant guilty under Section 20(b)(i) of the N.D.P.S. Act and he was convicted thereunder and sentenced to undergo R..I for one year. The benefit under Section 428 was also given to the appellant by the trial court. The appellant challenges the judgment of the trial court in this appeal. This appeal was filed by a counsel of his own choice. However, when the appeal was posted for hearing on 9.8.2001 since the counsel was found absent, this Court ordered to appoint a counsel from the State brief panel. Hence, this Court heard the counsel appearing for the appellant and the panel member so appointed by this Court and the Public Prosecutor.

3. The learned counsel appearing for the appellant had taken the following contentions for challenging the judgment of the trial court. Firstly it is contended that the finding of the court below that the appellant had committed the offence charged against him on the evidence of PWs 1 to 5 is not tenable in the light of the contradictions seen in the evidence of these witnesses. Secondly, it is

contended that the trial court ought to have seen that the mandatory provisions of Section 50 of the N.D.P.S Act has been violated by PW4 while detecting the offence as there is no evidence before the court that PW4 had given sufficient information to the appellant to have his right contemplated under Section 50 of the Act. Thirdly it is contended by the counsel that the trial court ought to have seen that, even if the evidence of the witnesses have been accepted, the ganja alleged to have been seized from the appellant was a small quantity and the same was kept for his own use and if so, the appellant is entitled for the benefit of Section 27 of the N.D.P.S. Act, 1985. The evidence of Dws 1 and 2, would prove that the contraband article seized from him was kept for his own use and not for sale. If so, the finding of the court below is perverse.

4. Before considering the contentions of the learned counsel appearing for the appellant it is only advantageous to this Court to survey the proved facts of the prosecution case against the appellant. To prove the case against the appellant, the prosecution relied on the evidence of Pws 1,2 and 4, out of whom PW4 was the Sub Inspector of Police, who detected the crime. This witness has

stated before the court that on the day of the incident, he had received a secret information that the appellant was selling ganja at the west of Kazhuthumuttu junction near the K.V sub station at Palluruthy and on receiving that information and on recording that information, he went to the spot and found that the appellant standing on the road. Immediately thereafter he issued a letter to PW2 - the circle Inspector of Excise, who being a Gazetted Officer for the purpose of searching the body of the appellant at the presence of PW2. Thereafter, PW2 came to the spot and the body of the appellant has been searched and the contraband article has been seized as per Ext.P1 mahazar. PW2 was the Circle Inspector of Excise, who had stated that the Sub Inspector requested him to come to the spot. This witness has further stated that on his presence, the body of the appellant was searched and MO1 was seized from the appellant. The prosecution tried to corroborate the evidence of these two witnesses by the evidence of PW1. PW1 though an independent witness examined to prove the seizure of Mo1 and the taking of the sample, he had stated before the court that he did not see seizure of the contraband from the appellant but he had admitted that he signed Ext.P1 mahazar as asked by one police constable namely Jamco, whom he knew early. The trial court

further relied on the evidence of PW5 the Circle Inspector of Police, who filed the final charge before the court. PW5 had stated that the sample taken from MO1 packet has been got analysed by the public analyst and as per Ext.P7 chemical report it was reported that the sample identified to be genuine ganja (Cannabis Sativa). This witness has further stated that after completion of the investigation, final charge has been filed. PW3 was examined only to prove the scene of occurrence by producing a plan drawn by him.

5. The trial court after considering the evidence of these witnesses found that the prosecution had succeeded in proving that the appellant was found in possession of 46.700 grams of ganja for the purpose of selling the same The question to be considered in this appeal in the light of the contentions raised by the counsel appearing for the appellant is that whether the judgment of the trial court is justifiable or not. The first contention of the counsel appearing for the appellant is that evidence of Pws 2 and 4 cannot be considered as conclusive to prove that MO1 packet was seized from the appellant as there was no supporting evidence of these witnesses. It has come out in evidence that though PW1 was examined as an independent witnesses, it could be seen from his

evidence that he had not seen seizure of MO1 from the appellant, but this witness has stated that he signed Ext.P1 as the police constable asked him. His evidence was also not free from doubt as he had stated that he used to go to the police station and he had signed Ext.P1 only because of constable Jamco told him, whom he was known early. However, the evidence of Pw1 would show that Ext.P1 mahazar was prepared by PW4 at the spot and PW2 was also present there. The evidence of Pws 2 and 4 is not enough to hold that the prosecution had succeeded in proving that the appellant was found in possession of MO1 which contained 46.700 grams of ganja. The next question to be considered is that whether PW4 had violated the mandatory provisions of Section 50 of the NDPS Act. Section 50 of the NDPS Act stipulates that when any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The evidence in this case would show that PW4 had got secret information that the appellant was selling ganja at the west of Kazhuthumuttu junction and on getting that information, he went to

the spot on seeing the appellant standing there. Immediately PW4 sent a letter to PW2 and who came at the spot. But, PW4 had not given any evidence that the appellant was informed about his right contemplated under Section 50 of the NDPS Act to have the presence of a Gazetted Officer at the time of search of his body. The evidence of PW4 would only show that on seeing the appellant on the road, he invited PW2 at the spot and in the presence of PW2, no question was put to the appellant regarding his right. He should have been informed regarding his right either oral or in writing. It was also not spoken to by PW4 that if the appellant wants the presence of a Gazetted Officer, he can require the same. The evidence brought before the court only shows that PW2 was brought to the spot and body of the appellant was searched. In this context, the trial court found that no prejudice has been caused even if the appellant was not at all informed of his right. Even though PW2 had given evidence before the court that he was present when the body of the appellant has been searched by PW4, PW2 had no case that he was informed of his right in his presence before searching appellant's body. It was also to be noted that PW4 had not given any evidence before the court regarding selling of ganja by the appellant. Yet another point argued before this

Court is non compliance of Section 57 of the Act. Seizure of ganja and arrest of the appellant have to be reported to his Superior Officer under Section 57 of the Act. Non compliance of Section 57 may not prejudice the appellant, but it creates doubt in the evidence of PW4. However, non-compliance of Section 50 is fatal to the prosecution case. The evidence on this aspect cannot be accepted against the appellant. In the above circumstances, this Court is of the view that the finding of the trial court that no prejudice has been caused to the appellant even if Section 50 is not complied or no evidence has been adduced by the prosecution, is not sustainable. In this context, the judgment of the Apex Court in **Beckodan Abdul Rahiman v. State of Kerala** (2002 (4) SCC 229) has been placed before this Court. In the above judgment, the Apex Court held that keeping in mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the shifting of the onus to the accused and severe punishment to which he becomes liable, the legislature has enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50 of the Act. Further the Apex Court held that compliance of Section 50 of NDPS Act is mandatory. The evidence now adduced in the case in hand would

not show that PW4 had complied with Section 50 of the NDPS Act. On this g round itself, the judgment of the trial court has to be set aside. The next contention of the learned counsel appearing for the appellant is that as per the case set up by the appellant the small quantity of ganja kept by him was for his own use and not for sale. To prove this fact, the appellant had examined two witnesses namely Dws 1 and 2 out of whom DW1 was examined to prove that the appellant was admitted in the hospital. DW2 has stated before the court that the appellant was admitted and treated at the General Hospital, Ernakulam from 2.4.1997 to 19.4.1997. This witness has further stated that the appellant was admitted with complaints of loss of appetitive and it was mentioned by people who brought by him that he was a known drug addict with withdrawal symptoms. This witness has further stated that the appellant was detected to have an abcess at thigh and symptoms of acid peptic decease. He has stated that though the appellant was not treated for de addiction he had given tranquillism The appellant also caused to produce Ext. X1 showing the treatment at the General Hospital, Ernakulam. However, the trial court had not considered the evidence of DW2 and found that that the appellant was not treated for de-addiction and the accused was

not entitled for a plea contemplated under Section 27 of the NDPS Act, 1985. DW1- a Ministerial warden of Sub Jail, Mattanchery has stated that the appellant w as in jail and he was admitted in the General Hospital from 2.4.1997 to 19.4.1997. Even though he had stated that the under trial register would not show the reason for sending the accused in jail. The fact that the appellant was admitted in the hospital is also spoken by him. In the above circumstances, evidence of DWs1 and 2 would show that small quantity of ganja seized from the appellant was only for his personal use. If so, the benefit contemplated under Section 27 of the Act would have been given to the appellant. However, this Court already found that the prosecution has not proved the case against the appellant as the evidence of Pws 1, 2 and 4 would not give confidence to this Court to hold that the prosecution established the seizure of 46.700 grams of ganja from the appellant.

An over all consideration of the entire evidence and the contentions of the learned counsel appearing for the appellant, this Court is of the view that the judgment of the trial court is not sustainable in law. Accordingly, that judgment is set a side and the appellant is found not guilty of any offences. Consequently, this appeal is allowed and the appellant is acquitted of all the charges

levelled against him. The bail bonds executed by the appellant shall stand canceled.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.829/2000

JUDGMENT

10th August, 2007.